Supreme Court, U.S.
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NO. 93-1593

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

ROSETTA HILLARY,

Petitioner,

versus

TRANS WORLD AIRLINES, INC.

Respondent

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS,
FIFTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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ATTORNEYS FOR RESPONDENT
TRANS WORLD AIRLINES, INC.

QUESTION PRESENTED FOR REVIEW

1. Whether this Honorable Supreme Court should grant a Writ of Certiorari to review an issue which is resolving itself within the circuit courts.

PARTIES TO THIS PROCEEDING

Rosetta Hillary

Trans World Airlines[1]

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[1] Trans World Airlines has no parent company and no subsidiaries which are not wholly owned.

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STATUTES INVOLVED

La. Civ. Code Ann. art. 3492 (West 1993):

> Delictual actions are subject to a liberative prescription of one year. This prescription commences to run from the day injury or damage is sustained. It does not run against minors or interdicts in actions involving permanent disability and brought pursuant to the Louisiana Products Liability Act or state law governing product liability actions in effect at the time of the injury or damage.

Fed. R. Civ. P. 41(a):

> (1) **By Plaintiff; by Stipulation.** Subject to the provisions of Rule 23(e); of Rule 66, and of any statute of the United States, an action may be dismissed by the plaintiff without order of court (i) by filing a notice of dismissal at any time before service by the adverse party of an answer or of a motion for summary judgment, whichever first occurs, or (ii) by filing a stipulation of dismissal signed by all parties who have appeared in the action. Unless otherwise stated in the notice of dismissal or stipulation, the dismissal is without prejudice, except that a notice of dismissal operates as an adjudication upon the merits when filed by a plaintiff who has once dismissed in any court of the United States or of any state an action based on or including the same claim.
>
> (2) **By Order of Court.** Except as provided in paragraph (1) of this subdivision of this rule, an action shall not be dismissed at the plaintiff's

instance save upon order of the court and upon such terms and conditions as the court deems proper. If a counterclaim has been pleaded by a defendant prior to the service upon the defendant of the plaintiff's motion to dismiss, the action shall not be dismissed against the defendant's objection unless the counterclaim can remain pending for independent adjudication by the court. Unless otherwise specified in the order, a dismissal under this paragraph is without prejudice.

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RESPONDENT'S BRIEF IN OPPOSITION

COUNTERSTATEMENT OF THE CASE

The facts in this case are not in dispute. Plaintiff alleges that on 16 March 1987, she was a passenger on TWA flights from Los Angeles to New Orleans. As she prepared to deplane in St. Louis to board a connecting flight, an employee of TWA allegedly injured her. In April 1991, over four years after her alleged accident, Plaintiff filed suit against TWA in the United States District Court

for the Eastern District of Louisiana. TWA answered and immediately filed a Motion for Summary Judgment asserting that the applicable one-year statute of limitations set forth in La. Civ. Code Ann. art. 3492 (West 1993) had expired. Plaintiff, "hard pressed to deny the correctness of TWA's position," moved for a voluntary dismissal without prejudice pursuant to Fed. R. Civ. P. 41(a) so that she could pursue the matter against TWA in Missouri.[2] The district court, recognizing that TWA's Motion for Summary Judgment was valid, granted TWA's motion and, following the clear mandate of the United States Court of Appeals for the Fifth Circuit, dismissed Hillary's case with prejudice.

Hillary timely perfected an appeal to the Fifth Circuit which summarily affirmed the district court's decision in a *per curiam* opinion. This Writ application ensued.

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[2]Missouri's statute of limitations is five years.

REASON WHY WRIT SHOULD BE DENIED

No Conflict Between the Circuit Courts Exists Such That A Review By This Court is Warranted.

Hillary submits that this Honorable Court should grant a Writ of Certiorari pursuant to Rule 10.1(a) of the Supreme Court Rules to address a perceived conflict between the Fifth and Eleventh Circuit Courts of Appeals. A review of Fed. R. Civ. P. 41(a) and the evolving jurisprudence interpreting the relevant provisions of that statute, however, confirms that any perceived conflict which may exist is being properly resolved in the Circuit Courts. As such, it is premature for this Honorable Court to consider the issue.

At issue is whether it is an abuse of discretion for a federal court to deny plaintiff a dismissal without prejudice pursuant to Rule 41(a)(2) of the Federal Rules of Civil Procedure where the defendant has filed a Motion for Summary Judgment based on an applicable statute of limitations and a dismissal without prejudice would deny defendant this absolute defense.

Fed. R. Civ. P. 41(a)(2) provides in pertinent part:

> An action shall not be dismissed at the plaintiff's instance save upon order of the court and upon such terms and conditions as the court deems proper.

When considering a dismissal without prejudice, the court should keep in mind the interest of the defendant, for it is his position which should be protected. 9 Wright and

Miller, Fed. Practice and Procedure; Civil §§ 2362, 2364 at 164, 165 (1971), *citing* LeCompte v. Mr. Chip, Inc., 528 F.2d 601, 604 (5th Cir.1967).

In the proceedings below, the district court and the Court of Appeals based its decision on Phillips v. Illinois Central Gulf Railroad, 874 F.2d 984 (5th Cir.1989), which held that the loss of a valid statute of limitations defense constitutes the type of clear legal prejudice that precludes granting a motion to dismiss without prejudice. *Id.* at 987. Hillary, relying on McCants v. Ford Motor Co., 781 F.2d 855 (11th Cir. 1986), argues that this court should grant writs because Phillips and McCants are at odds. Hillary then states that "virtually every court that has addressed this issue has decided in favor of the party moving for dismissal without prejudice" (petitioner's writ application p.3). That statement is inaccurate.

The weight of lower court authority suggests that the Phillips court reached the correct result.[3] Moreover, at least one other circuit has specifically rejected McCants and adopted the Phillips rationale. In Metropolitan Federal Bank v. W.R. Grace & Co., 999 F.2d 1257 (8th Cir. 1993) the Eighth Circuit squarely confronted Phillips and McCants and held:

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[3]*See* Love v. Silas Mason, 66 F.Supp. 753 (W.D. La. 1946); Bamdad Mechanic Company Ltd. v. United Technologies Corp., 109 F.R.D. 128 (D. Del. 1985); Placid Oil Company v. Ashland Oil, Inc., 792 F.2d 1127 (Em. App. 1986); Patterson v. Alaska Airlines, Inc., 756 F. Supp. 476 (W.D. Wash. 1990).

> To the extent the Eleventh Circuit would hold that the loss to the defendant of a proven, valid statute of limitations defense does not constitute legal prejudice that would bar voluntary dismissal, we respectfully disagree. We would consider it an abuse of discretion for a district court to find no legal prejudice, and thus to grant voluntary dismissal, where the non-moving party has demonstrated a valid statute of limitations defense to the claims sought to be dismissed.

Metropolitan Federal Bank v. W.R. Grace & Co., 999 F.2d at 1263.

Even within the Eleventh Circuit, the McCants holding is being questioned. In Gulf States Steel v. Lipton, 765 F. Supp. 696 (Northern District Ala. 1990), *aff'd*, 934 F.2d 1265 (11th Cir.1991) the defendants filed a Motion for Summary Judgment based in part on the tolling of Alabama's statute of limitations. Thereafter, plaintiffs filed a motion pursuant to Rule 41(a) for voluntary dismissal without prejudice so that they could refile their suit in a jurisdiction with a longer statute of limitations. The district court first acknowledged that the issue was squarely confronted by the Eleventh Circuit in McCants, but then noted that the Fifth Circuit "expressly reject[ed] McCants seemingly broad holding" in Phillips. Gulf States 765 F. Supp. at 699. The Gulf States court thereafter resisted extending McCants by factually distinguishing the action before it from McCants. Plaintiff's Motion for Voluntary Dismissal was denied.

CONCLUSION

The perceived conflict which plaintiff highlights is resolving itself within the lower courts. The bright line rule set forth in McCants which Hillary wishes this Court to adopt has been rejected expressly by the Fifth and Eighth Circuits. Moreover, the Phillips rationale which petitioner wishes to overturn has been adopted by the Fifth and Eight Circuits and embraced by one of the district courts within the Eleventh Circuit. As such, this Honorable Court should deny petitioner's Writ application and permit this perceived conflict to meet its evolutionary demise within the lower courts.

Respectfully Submitted,

BY: _____

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ATTORNEYS FOR RESPONDENT
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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing pleading has been served on counsel for all parties by depositing same in the United States Mail, postage prepaid, this 6 day of May, 1994.

HOWARD DAIGLE, JR.